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Richard D. Madsen, Nancy Madsen, Boyd A. Swensen, Beatrice Swensen, Blaine Anderson, Sheree Anderson, Hope A. Hilton, Cynthia Hilton, Ralph M. Hilton, Gene Helland, and the Middle East Foundation v. Mirvin D. Borthick, W. Smoot Brimhall, and John Does 1 to V, Former Commissioners of the utah Department of Financial Institutions : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

19704

RICHARD D. MADSEN and NANCY MADSEN, his wife, BOYD A. SWENSEN and BEATRICE SWENSEN, his wife, BLAINE ANDERSON and SHEREE ANDERSON, his wife, HOPE A. HILTON, CYNTHIA HILTON, RALPH M HILTON, GENE HELLAND and the MIDDLE EAST FOUNDATION,

Plaintiffs and Appellants,

vs.

MIRVIN D. BORTHICK, W. SMOOT BRIMHALL, and JOHN DOES I to V, being former Commissioners of the Utah Department of Financial Institutions,

Defendants and Respondents.

Case No. 19704

BRIEF OF RESPONDENTS

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BRIEF OF RESPONDENTS

NATURE OF THE CASE

This is an action by several investors in Grove Finance Company against former Comissioners of the Utah Department of Financial Institutions, to recover the full amount of their investment which was lost when Grove Finance became insolvent.

DISPOSITION IN THE LOWER COURT

The Third District Court, Honorable David B. Dee,

granted Respondents' motion for summary judgment.

RELIEF SOUGHT ON APPEAL

Appellants seek a reversal of the order granting summary judgment and remand to the district court.

STATEMENT OF FACTS

Respondents generally agree with the Statement of Facts in Appellants' Brief, other than disagreeing to some extent as to the basis of the Court's ruling in Madsen v. Borthick, 658 P.2d 627 (Utah, 1983) (discussed in Point II, infra. In addition, however, Respondents would point out that, to this day, Appellants have filed no notice of claim in this matter, pursuant to Sections 63-30-11 and -12 of the Utah Governmental Immunity Act (R.64); and that Appellants filed the same complaint in this matter as was filed in the earlier Madsen v. Borthick, supra (hereinafter "Madsen I"), except that in this action they have (1) named Commissioners Borthick and Brimhall instead of Commissioner Borthick and the State as defendants (see paragraph 2 in each Complaint); (2) claimed that the identical acts now constitute "gross negligence" (see paragraph 5 in each Complaint); (3) dropped their class action allegations; and (4) alleged that a duty to supervise Grove Finance Company existed under both Title 7 (as previously alleged) and Title 70B of the Utah Code (see Appellants' "Alternative Cause of Action" in Complaint in

instant action). The Complaint from Madsen I (supplement to record herein) is appended hereto as Appendix A, and the Complaint from this action (R.2-8) as Appendix B.

ARGUMENT

POINT I. RESPONDENTS ARE IMMUNE FROM SUIT IN THIS ACTION ON PRECISELY THE SAME GROUNDS SET OUT IN MADSEN V. BORTHICK, BECAUSE THIS SUIT IS IN SUBSTANCE THE SAME SUIT AND COMES TO THE COURT IN THE SAME POSTURE AS THE EARLIER ACTION.

In Madsen v. Borthick, supra, 658 P.2d 627 (Utah, 1983), this Court held that:

(1) Governmental supervision of financial institutions is a "governmental function" to which provisions of the Utah Governmental Immunity Act (U.C.A. 63-30-1, et seq.) apply;

(2) Since Appellants did not comply with U.C.A. 63-30-11 and -12, the notice requirement of the Immunity Act, their Complaint against the State was properly dismissed;

(3) Under U.C.A. 63-30-4, a "governmental official or employee can only be sued in a representative capacity when the governmental entity is liable," id. at 633, so dismissal as to Commissioner Borthick in his representative capacity was proper; and

(4) Dismissal as to Commissioner Borthick in his individual capacity was also proper because, under U.C.A.

63-30-4, no allegation was made in the Complaint of "gross negligence, fraud, or malice."

The instant case comes to the Court in precisely the same posture as Madsen I, with no notice of claim ever having been filed (R. 64). Appellants employ several ingenious semantic dodges in their present Complaint in order to circumvent the Court's ruling in Madsen I, but as a matter of law, still fail to state a valid claim.

A. THIS ACTION AGAINST STATE EMPLOYEES IS BARRED BY U.C.A. 63-30-4, SINCE THE SAME ACTION AGAINST THE STATE HAS PREVIOUSLY FAILED.

U.C.A. 63-30-4(3), as amended by the 1983 Utah Legislature, states:

> The remedy against a governmental entity or its employee for an injury caused by an act or omission which occurs during the performance of such employee's duties, within the scope of employment, or under color of authority is . . . exclusive of any other civil action or proceeding by reason of the same subject matter against the employee . . . whose act or omission gave rise to the claim, unless the employee cited or failed to act through fraud or malice. (Emphasis added.)

The 1983 Legislature deleted the words "gross negligence" prior to "fraud or malice" in the final clause.

In Madsen I, Appellants sued the State of Utah to recover the amount of their investment in Grove Finance Company. That action failed. Appellants may not now maintain this action against Commissioners Borthick and

Brimhall, because their "remedy" against the State was "exclusive of any other civil action" against state employees. Both the clear statutory language and common sense dictate that a separate, substantively identical cause of action may not be brought against public employees where it has been previously held that no cause of action exists against the public entity which employed them.

Appellants seek to circumvent this provision by alleging that Respondents are named in their individual rather than representative capacity, that the pre-1983 statutory language applies here, and that their claim of "gross negligence" makes this case a valid exception to the statutory rule. These points are not well-taken.

B. RESPONDENTS IN THIS ACTION ARE CLEARLY NAMED IN A REPRESENTATIVE CAPACITY AND, SINCE APPELLANTS HAVE NEVER FILED A NOTICE OF CLAIM, THIS ACTION MUST BE DISMISSED UNDER THE COURT'S HOLDING IN Madsen I.

In Madsen I, this Court relied on the pre-1983 versions of U.C.A. 63-30-11 and -12, the notice-of-claim statutes:

> 63-30-11. Any person having a claim for injury to person or property against a governmental entity or its employee shall, before maintaining an action under this act, file a written notice of claim with such entity for appropriate relief including money damages. The notice of claim shall . . . be directed and delivered to the responsible governmental entity within the time prescribed in section 63-30-12 or

> 63-30-13, as applicable.
> . . .
> 63-30-12. A claim against the state is barred unless notice of claim is filed with the attorney general and the agency concerned within one year after the cause of action arises. (Emphasis by Court, 658 P.2d at 630).

The Court ruled that dismissal of Madsen I as to the State was proper "on the basis of governmental immunity and noncompliance with the notice requirement." Id. at 632.

As to Commissioner Borthick, the Court cited the final paragraph of U.C.A. 63-30-4:

> An employee may be joined in an action against a governmental entity in a representative capacity if the act or omission complained of is one for which the governmental entity may be liable, but no employee shall be held personally liable for acts or omissions occurring during the performance of the employee's duties . . . unless it is established that the employee acted or failed to act due to gross negligence, fraud or malice. (Emphasis by Court, 658 P.2d at 633.)

(Again, the 1983 Legislature removed the words "gross negligence" in the final clause.)

In the instant action, Commissioners Borthick and Brimhall are clearly named in a representative capacity, as former Commissioners of Financial Institutions for the State of Utah. Appellants' startling assertion that "[t]he respondents in this action are individuals being sued in their individual capacity only" (Appellants' Brief, p. 8) is thoroughly belied by the Complaint. The action names

Commissioner Borthick and Brimhall and John Does I to V, "being former Commissioners of the Utah Department of Financial Institutions" (R.2). Paragraph 2 of the Complaint identifies the John Does as former commissioners, and states:

> This allegation includes each commissioner who has held office from the incorporation of Grove Finance to the insolvency of Grove Finance. (R.2-3).

Furthermore, the entire tenor of the Complaint is that Respondents purportedly failed to fulfill a statutory duty to inspect and regulate the financial affairs of Grove Finance (cf. paragraphs 4 and 12-14 at R. 3-5, 6). Of course, the idea that Respondents had any such duty or authority in a personal capacity is ludicrous, and the Complaint makes no such pretense. It was also undisputed on the record before the District Court in this matter that neither Respondent ever had any dealings or involvement of any kind with Grove Finance in any private capacity, and that any activity in which either Respondent ever engaged relating to the inspection or supervision of financial institutions occurred within the scope of his employment as Commissioner of Financial Institutions (R.53, 55).

This Court has previously stated:

> The substance of the pleading and the nature of the issues which are raised, rather than the pleader's designation of the cause of action, control the issue.

Lord v. Shaw, 665 P.2d 1288, 1290 (Utah, 1983).

In this case, only Respondents' official activities as State officers are advanced as a basis for liability; Respondents are clearly named in a representative capacity, and Appellants' semantic wand-waving does not make it otherwise.

Since the State is not liable in this matter, as the Court held in Madsen I, State officials named in their representative capacity for official acts or omissions cannot be sued, 658 P.2d at 633. Precisely the same grounds on which the Court relied in the earlier case mandate the affirming of the District Court's action in this case.

C. THE 1983 AMENDMENTS TO THE GOVERNMENTAL IMMUNITY ACT ARE REMEDIAL IN NATURE AND APPLY TO BAR THIS ACTION, EVEN IF IT IS ASSUMED ARGUENDO THAT RESPONDENTS ARE NAMED IN A PERSONAL CAPACITY.

Next, Appellants argue that an allegation of "gross negligence" in their Complaint is sufficient, under the pre-1983 statutes, to obviate the notice-of-claim requirement of U.C.A. 63-30-11 and -12 and to circumvent the language of U.C.A. 63-30-4 barring personal liability (Appellants' Brief, pp. 8-10, 12-14). As to the claim statute, Appellants rely on what was the second paragraph of U.C.A. 63-30-11, prior to 1983:

> Service of the notice of claim upon an employee of a governmental entity is not a condition precedent to the commencement of an action or special proceeding against such person. If an

> action or special proceeding is commenced against the employee, but not against the governmental entity, service of the notice of claim upon the governmental entity is required only if the entity has a statutory duty to indemnify such person.

Appellants argue that there is no obligation to indemnify an employee if it is established that he acted with gross negligence, under U.C.A. 63-48-3(4) as that section existed prior to 1983, and that therefore no notice of claim was required in this case (Appellants' Brief, p. 10).

The 1983 Legislature made the following changes which pertain to this action:

1. Deleted the phrase "gross negligence" from U.C.A. 63-30-4, clarifying the broad applicability of the exclusive remedy rule and the fairly narrow grounds on which public employees may be personally liable;

2. Amended U.C.A. 63-30-11 to clarify the fact that a notice of claim must be served upon the State if, as here, a claim is asserted against a State employee for an act or omission occurring during the performance of his duties (compare 1983 and pre-1983 versions in Appendix C herein);

3. Repealed in toto the former second paragraph of U.C.A. 63-30-11, set out supra, the section of the notice requirement upon which Appellants rely; and

4. Recodified U.C.A. 63-48-3 as U.C.A. 63-30-36,

and in so doing, repealed U.C.A. 63-48-3(4), upon which Appellants rely for their contention that the State has no duty to indemnify Respondents.

Respondents submit that each of these changes is remedial in nature, not creating or repealing substantive rights, but setting forth with greater clarity the notice procedure which must be followed in bringing suit against public entities or employees within the scope of employment, and the bounds of potential liability in such cases as between entities and their employees. The same substantive causes of action that existed prior to the amendments still exist, against either the entity or the employee; modifications in the notice requirement or the duty of public entities to indemnify employees do not affect these substantive rights.

Remedial statutory amendments, providing only "a different mode or form of procedure for enforcing substantive right . . . are generally applied retrospectively to accrued or pending actions to further the Legislature's remedial purpose." Pilcher v. State, Department of Social Services, 663 P.2d 450, 455 (Utah, 1983). Foil v. Ballinger, 601 P.2d 144 (Utah, 1979), a case upon which Appellants rely, which considered the limitation and notice-of-claim provisions of the Utah Health Care Malpractice Act, stands for the proposition that

remedial amendments which clarify existing procedural requirements for the bringing of particular actions, apply "to accrued, pending, and future actions." id. at 151, citing Boucofski v. Jacobsen, 36 Utah 165, 104 P. 117 (1909).

This action was filed on July 20, 1983 (Appellants' Brief, pp. 2, 4), well after the 1983 amendments to the Governmental Immunity Act were in effect. The amendments are remedial in nature, and clearly bar the instant action.

D. EVEN IF IT IS ASSUMED THAT THE 1983 AMENDMENTS DO NOT APPLY HERE, APPELLANTS' MERE UNSUPPORTED ALLEGATION OF "GROSS NEGLIGENCE" IS NOT SUFFICIENT TO OBVIATE THE NOTICE REQUIREMENT AND OTHER PROVISIONS OF THE GOVERNMENTAL IMMUNITY ACT.

Finally, giving the benefit of every doubt to Appellants and assuming arguendo that Respondents are not named in a representative capacity and that the 1983 amendments to the Governmental Immunity Act do not apply here, a careful review of the pre-1983 law compels the conclusion that Appellants have still failed to state a valid cause of action.

Appellants' allegation in this action of "gross negligence" is made in order to circumvent (1) the notice-of-claim requirement in U.C.A. 63-30-11 and (2) the exclusive-remedy and no-personal-liability provisions of

U.C.A. 63-30-4. Before examining each of those sections, it is important to emphasize the lack of support in Appellants' Complaint for their gratuitous allegation of "gross negligence," and the identical substance of this Complaint and the Complaint in Madsen I, where no "gross negligence" was alleged. In paragraph 4 of the earlier Complaint, Appellants listed nine statutory duties they claim Respondents had under Title 7, and stated in paragraph 5:

> Defendants have wholly failed to discharge the duties and responsibilities pleaded in # 4 above. (R. supp.)

In the instant Complaint, the identical list of duties is set out verbatim in paragraph 4, and paragraph 5 then states:

> Defendants have been grossly negligent in that they have wholly failed to discharge any of the duties and responsibilities pleaded in # 4 above. (R.5).

No additional facts are set forth as a basis for the new allegation of "gross negligence."

So pleading is a transparent attempt by Appellants to circumvent requirements of the Immunity Act and the ruling in Madsen I by simply repeating the legal catchword, "gross negligence." This attempt to exalt form over substance should not be abetted by the Court. The "substance of the pleading and the nature of the issues . . . raised" must control, rather than "the pleader's

designation" of his action. Lord v. Shaw, supra, 665 P.2d 1288, 1290 (Utah, 1983). As this Court observed in Madsen I, "An important legal consequence should not be at the mercy of semantics." 658 P.2d at 631.

(1) U.C.A. 63-30-11.

In order to skirt the claim requirement, Appellants rely on the since-repealed second paragraph of U.C.A. 63-30-11, providing that, if an action is commenced against an employee but not against a governmental entity, "service of the notice of claim upon the governmental entity is required only if the entity has a statutory duty to indemnify" the employee. In support of their allegation that the State would not have a duty to indemnify Commissioners Borthick and Brimhall, Appellants rely on U.C.A. 63-48-3(4) (also repealed in 1983):

> No public entity is obligated to pay any judgment based upon a claim against an officer or employee if it is established that the officer or employee acted or failed to act due to gross negligence, fraud, or malice. (Emphasis added.)

It is significant that, in order to nullify the indemnification duty, gross negligence, fraud, or malice must be established, presumably at a trial on the merits, not merely alleged in a plaintiff's complaint. By the indemnification provisions, the Legislature intended "to protect officers and employees of public entities from

personal liability arising from acts or omissions committed . . . within the scope of their employment. . . ." (former U.C.A. 63-48-1). It is inconceivable that the Legislature intended such protection to be so ephemeral as to vanish at the mere unsupported mention of "gross negligence" in a plaintiff's complaint.

The State's duty to indemnify its employees is to some extent linked to its representation of the employee, as set forth in U.C.A. 63-48-3(2):

> If the public entity conducts the defense of the officer or employee against the claim, then the public entity shall pay any judgment based upon or any compromise or settlement of the claim except as provided in subsections (3) or (4). . . . (Emphasis added.)

In turn, if a public officer desires defense against "any claim," he must request that the entity defend him and must cooperate in the defense; unless he fails to do so, the entity is obligated to defend him "against the claim," U.C.A. 63-48-3(1), and to "pay any judgment based upon . . . the claim . . . .", U.C.A. 63-48-3(2) (emphasis added). The important term, "claim," was statutorily defined as:

> . . . any alleged personal legal liability arising out of any act or omission by any officer or employee during the performance of his duties, within the scope of his employment, or under color of authority. U.C.A. 63-48-2(3) (emphasis added).

Thus, the focus of the pre-1983 indemnification provisions

was on whether the employee's conduct occurred within the scope of employment; if so, the alleged liability constituted a "claim," and the entity had a duty to defend the employee (assuming a request and cooperation by the employee), and to pay any judgment based on the claim. The question of whether "gross negligence" was involved had no bearing upon the initial obligation to defend and subsequently to indemnify the employee, unless the existence of gross negligence was established by the finder of fact, under U.C.A. 63-48-3(4).

As a matter of statutory construction, therefore, the question of whether the State had a statutory duty to indemnify Respondents, so as to require a notice of claim under the former second paragraph of U.C.A. 63-30-11, depends upon whether the conduct alleged was within the scope of Respondents' public employment, not whether Appellants make an allegation of "gross negligence." This construction also makes eminently good common sense. Whether an act or omission involved "gross negligence" is a classic fact question which, in any disputed case, must be resolved by the trier of fact. No doubt recognition of this fact, and a desire that an entity's duty to indemnify its employee not be avoided whenever a mere allegation of gross negligence is made, led to the requirement in U.C.A. 63-48-3(4) that gross negligence be established in order

for an entity to avoid its indemnification duty. It would make no sense at all for the notice-of-claim requirement to depend on a determination of this purely factual question as the initial step of litigation, prior to the filing of a lawsuit or to opportunity by the parties to discover fully the facts of the case.

A far more sensible course is to construe the former second paragraph of U.C.A. 63-30-11 to require filing a claim where the conduct alleged occurred "during the performance of [the employee's] duties, within the scope of his employment, or under color of authority," so as to constitute a "claim" for which a public entity must provide indemnification. It is certainly true that some factual determination is involved in deciding whether conduct was during the performance of public duties, within the scope of public employment, or under color of authority. However, as a practical matter, Respondents submit that in the vast majority of cases, this determination can be far more readily made at the initial stage of proceedings, when a notice of claim must be filed, than can a largely subjective determination as to whether an employee acted with "gross negligence, fraud, or malice."

This interpretation is substantiated by the clarifying amendment of U.C.A. 63-30-11 which the 1983 Legislature made (now codified as 63-30-11(2)):

> Any person having a claim for injury against a governmental entity or against an employee for an act or omission occurring during the performance of his duties, within the scope of employment, or under color of authority shall, before maintaining an action, file a written notice of claim with such entity.

As discussed in Point I-B, supra, the allegations in Appellants' Complaint undeniably center on acts or omissions occurring within the scope of Respondents' employment as Commissioners of Financial Institutions and during the performance of their official duties. The State has a palpably clear obligation to indemnify Respondents for any judgment Appellants may eke out in this matter. That this is so was obvious from the time of the closure of Grove Finance Company onward. Appellants cannot void the statutory notice requirement by a gratuitous allegation of "gross negligence."

(2) U.C.A. 63-30-4.

Prior to 1983, the second paragraph of U.C.A. 63-30-4 provided that a remedy against a governmental entity or employee was exclusive of any other action against an employee, unless the employee acted with gross negligence, fraud, or malice. The third paragraph stated that no employee may be held personally liable for acts "during the performance of the employee's duties, within the scope of employment or under color of authority," unless gross

negligence, fraud, or malice were established. Again, the clear contemplation seems to be that gross negligence, fraud, or malice must have been established by the trier of fact in the initial action against the entity or employee, before a plaintiff may proceed with a separate additional suit against the employee. In any event, there is no indication that the statutory standard of no liability for public employees within the scope of employment was intended to be obviated by a mere allegation of gross negligence, as Appellants contend. As set out supra, important legal consequences should not depend upon the mere recitation of a legal catch-phrase in a complaint.

Under U.C.A. 63-30-4, Appellants' earlier action against the State and a State official was their exclusive remedy; they may not now have a second bite at the apple by suing the same official and his predecessor for the same damages claimed previously.

> POINT II: APPELLANTS' ACTION WAS DISMISSED WITH PREJUDICE IN MADSEN I FOR FAILURE TO STATE A CLAIM, AND IS NOW BARRED BY RES JUDICATA.

In order for the doctrine of res judicata to apply so as to bar a second action:

> (1) the two cases must be between the same parties or their privies; (2) there must have been a final judgment on the merits of the prior case; and (3) the prior adjudication must have involved the same issue or an issue that could or should have been raised therein.

Krofcheck v. Downey State Bank, 580 P.2d 243, 244 (Utah, 1978).

The doctrine applies with equal force to issues actually adjudicated and to issues or claims which could have been adjudicated in the earlier proceedings. Church v. Meadow Spring Ranch Corporation, Inc., 659 P.2d 1045, 1048 (Utah, 1983); Searle Bros. v. Searle, 588 P.2d 689, 690 (Utah, 1978).

Apparently Appellants do not dispute that the first and third Krofcheck criteria are met in this case. As to (1), Commissioner Borthick was a named defendant in the earlier case, and clearly a state official such as Commissioner Brimhall is in privity with the State, which was also a defendant in Madsen I (see 50 C.J.S., Judgments 796a, p. 335); the plaintiffs in the two cases are the same. As to (3) precisely the same nucleus of operative fact is alleged here as in Madsen I; in both cases, Appellants seek to recover the full amount of their investment in Grove Finance Company, plus interest, on the basis that officials of the Department of Financial Institutions failed to properly supervise or regulate the financial affairs of Grove. Appellants' new allegations regarding gross negligence and a duty to supervise under Title 70B are merely statements of additional legal grounds on which Appellants hope to recover, based upon the same facts as in Madsen I. These additional legal issues could certainly

have been raised in the earlier suit, were they viable; the fact that Appellants chose not to do so does not defeat application of res judicata.

Appellants do contend, however, that the earlier dismissal of their action was not on the merits, being based upon their failure to file a notice of claim, and so res judicata does not apply (Appellant's Brief, pp. 4-8). This misconstrues the basis of the Court's decision in the earlier suit.

In Madsen I, this Court affirmed dismissal of Appellants' action against the State because no notice of claim had been filed, and on the additional ground of substantive immunity. After concluding that the case involved a "governmental function" to which the Immunity Act applies, the Court continued:

> Since the injury allegedly suffered by plaintiffs resulted from "the exercise of a governmental function," the state is immune from suit under § 63-30-3, unless immunity is expressly waived in one of the succeeding sections of the Governmental Immunity Act. Section 63-30-10 waives immunity for injuries caused by the negligent act or omission of a government employee (except those arising out of "a discretionary function"). While plaintiffs' allegation that defendnt Borthick had "wholly failed to discharge" his statutory duties and responsibilities might be construed as an allegation of a negligent omission, plaintiffs expressly disavowed that construction by conceding in the district court that

> their cause of action did not fall under any of the statutory exceptions to immunity. They make no contrary argument in this Court. For this reason, and because their cause of action is barred in any case by the notice of claim provision. . . we have no occasion to rule upon whether defendant Borthick's action constituted "a negligent act or omission of an employee" or involved a "discretionary function" within the meaning of § 63-30-10. . . .
>
> The dismissal of plaintiffs' complaint against the State was proper on the basis of governmental immunity and noncompliance with the notice requirement. 658 P.2d at 631-2 (emphasis added).

It is not contended by Appellants, nor could it validly be, that dismissal of an action on grounds of substantive immunity is not an adjudication on the merits to which res judicata would apply. Cf. Annapolis Urban Renewal Authority v. Interlink, Inc., 43 Md.App. 286, 405 A.2d 313 (1979), where the court held that a prior judgment on the basis of sovereign immunity was a "judgment on the merits" for res judicata purposes:

> When a court dismisses an action because of jurisdictional, procedural, or venue problems, it is acting for reasons that do not go to the substance of the case. But, when a court decides that it cannot hear the case because of a legal defense such as sovereign immunity, it is deciding that, as a substantive matter, the plaintiff cannot maintain his cause of action.
>
> . . .
>
> [W]e believe that . . . a judgment based upon the defense [of sovereign immunity] is a judgment on the merits. Id. at

> 318, 319 (emphasis added; see discussion at 317-19).

The Maryland court approvingly cited Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773, 776 (1946):

> [I]t is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. . . If the court does . . . exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits. . . . Cited 405 A.2d at 318.

It is worthy of note that the district court's dismissal in Madsen I was with prejudice, "for failure to state a claim upon which relief could be granted." Id. at 628. This distinguishes the instant case from Foil v. Ballinger, supra, 601 P.2d 144 (Utah, 1979), relied upon by Appellants for the proposition that dismissal for failure to comply with a notice-of-claim requirement (there, the provisions of the Utah Health Care Malpractice Act) does not constitute an adjudication on the merits. Appellants' reliance ignores the status of the earlier dismissal in the Foil case:

> Because the [earlier] suit was dismissed without prejudice, the dismissal was not an adjudication on the merits. Id. at 149 (emphasis added).

It is also noteworthy that, in paragraph 9 of their Complaint, Appellants allege that they discovered their loss on July 18, 1980, when Grove Finance closed its

doors (R.5); and that Madsen I was dismissed by the district court on May 14, 1981 (Appellants' Brief, p. 3), less than one year later. Had the district court's dismissal been solely based on a failure to file notice, the appropriate course would have been a dismissal without prejudice, since Appellants at that time were still within the one-year notice period (U.C.A. 63-30-12), and could still have filed a notice of claim. That the district court's action was also based on substantive immunity is evident in its dismissal for failure to state a claim.

Moreover, even if substantive immunity were not involved here, strong policy reasons favor considering dismissal for failure to file timely notice a res judicata bar to subsequent suits. An analagous situation was presented in Haefner v. County of Lancaster, 543 F.Supp. 264 (E.D. Pa., 1982), affd., 703 F.2d 550 (3d Cir., 1983). Plaintiff Haefner brought a 1983 action against a city, county, and public officials, alleging a conspiracy to secure a criminal prosecution against him. The federal court dismissed Haefner's first suit because it was time-barred under the applicable Pennsylvania statute of limitation, Haefner v. County of Lancaster, 520 F.Supp. 131 (E.D. Pa., 1981), affd., 681 F.2d 806 (3d Cir., 1982). Haefner then brought a second suit, naming one additional individual defendant not named in the first suit, and adding

allegations concerning additional false charges and failure to expunge his record, 543 F.Supp. at 266. Finding first that the same parties were involved in both cases, the court continued:

> We have equally little trouble finding that the second required element, a final, valid judgment on the merits, is met. A dismissal for failure to state a claim is a "judgment on the merits." [citation omitted] Likewise, dismissal of a suit as time-barred establishes a res judicata bar. [citation omitted] Id. (Emphasis added.)

Similarly, in the instant matter, dismissal of Appellants' suit for failure to state a claim upon which relief could be granted must be deemed a final judgment on the merits, supporting application of res judicata.

The sound policy bases for applying the previous judgment under res judicata to this case are evident. If the instant action were allowed, any plaintiff, having suffered an adverse ruling in an action against a state agency, could bring another action based on the same facts against any agency employee involved with the alleged loss. Presumably the number of successive suits which could be brought on that basis would be limited only by the plaintiff's tenacity and the number of separate employees who could be linked in any way to a purported loss. All of the elements of res judicata are present here, and the district court's ruling in this case should be affirmed.

POINT III: THIS ACTION IS BARRED BY THE THREE-YEAR STATUTE OF LIMITATION, U.C.A. 78-12-26(4), AND THE DISTRICT COURT'S ORDER SHOULD ALSO BE AFFIRMED ON THIS BASIS.

As previously noted, in paragraph 9 of their Complaint Appellants aver that they did not discover Respondents' alleged negligence until July 18, 1980, when Grove Finance was taken into receivership by the State (R.5). Complaint in the instant matter was filed on July 20, 1983 (Appellants' Brief, pp. 2, 4). This would appear to be three years and two days after the latest date when a cause of action may be deemed to have arisen.

In Madsen I, 658 P.2d at 631, n. 7, this Court indicated in dicta that the statute of limitation which would apply in this case is U.C.A. 78-12-26(4), which provides a three-year limitation on an action "for a liability created by the statutes of this state, other than for a penalty or forfeiture. . . ." The instant action is thus barred as untimely.

Appellants argue that U.C.A. 78-12-40 saves their suit (Appellants Brief, pp. 10-12). The statutory language itself belies that contention:

> If any action is commenced within due time and . . . the plaintiff fails in such action or upon a cause of action otherwise than upon the merits, and the time limited either by law or contract for commencing the same shall have expired, the plaintiff . . . may commence a new action within one year

after the reversal or failure.
(Emphasis added.)

Thus, the operation of Utah Code Ann. § 78-12-40 is contingent upon the action initially having been commenced in a timely and proper manner; the section does not operate as a cure-all for failures to comply with conditions precedent to filing earlier suits. Foil v. Ballinger, supra, indicates that Section 78-12-40 does not apply here; in that case, the Court found that the plaintiff could refile her action within one year if the first action had been properly "commenced" as that term is used in section 78-12-40. 601 P.2d at 149 (emphasis added). Here, Appellants' initial action was never properly "commenced within due time" (i.e., within one year of denial of an appropriate notice of claim, Utah Code Ann. § 63-30-12, -15), and may not now be resurrected by Section 78-12-40.

CONCLUSION

Commissioner Borthick and Commissioner Brimhall are named defendants in this action in their capacity as former Commissioners of Financial Institutions of the State of Utah for acts or omissions which occurred during the performance of their official duties, within the scope of that employment, and under color of authority. Under the Court's decision in the first Madsen v. Borthick, because the State is not subject to suit, neither are Respondents. Furthermore, Appellants have never filed a notice of claim

under U.C.A. 63-30-11, and their suit is barred under either the 1983 or pre-1983 version of that statute. Appellants' gratuitous allegations of "gross negligence" have no substance and do not change that result.

In addition, both the doctrine of res judicata, in light of the ruling in Madsen I, and the applicable statute of limitation, U.C.A. 78-12-26(4), bar this action.

Respondents pray tht the order of the district court granting summary judgment in their favor be affirmed.

Respectfully submitted this 19th day of April, 1984.

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Chief, Litigation Division

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CERTIFICATE OF MAILING

I hereby certify I mailed two copies of the foregoing Brief of Respondent to the following counsel of record this 19th day of April, 1984:

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APPENDIX A

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

RICHARD D. MADSEN and NANCY MADSEN, his wife, BOYD A. SWENSEN and BEATRICE SWENSEN, his wife, HOPE A HILTON, BLAINE ANDERSON and SHEREE ANDERSON, his wife, CYNTHIA HILTON, RALPH M. HILTON, MIDDLE EAST FOUNDATION and GENE A HELLAND, on behalf of themselves and all others similarly situated, Plaintiffs, vs. MIRVIN D. BORTHICK, Commissioner of the Utah Department of Financial Institutions; and the STATE OF UTAH Defendants.	COMPLAINT Civil No. C 81-1790

On behalf of themselves and all others similarly situated, plaintiffs allege:

PARTIES AND RELATED ENTITIES

1. Plaintiffs are each depositors in Grove Finance Company.

2. Defendant Mirvin D. Borthick is the Commissioner of the Utah Department of Financial Institutions.

3. Grove Finance Company is a Utah corporation transacting a banking business within the State of Utah within the meaning of § 7-3-1 U.C.A. in that Grove Finance Company holds itself out to the public as receiving money on deposit within the meaning of § 7-3-3 U.C.A.

PLAINTIFFS' CAUSE OF ACTION

4. Defendant Mirvin D. Borthick and the defendant State of Utah had a duty to inspect and supervise the financial integrity of Grove Finance Company within the meaning of § 7-1-7 U.C.A. In particular, defendants had a duty to do the following:

A. Visit and examine every banking business at least once each year within the meaning of § 7-1-8 U.C.A.

B. At the time of each annual visit to inquire into the condition and resources of the institution examined, the mode of conducting and managing its affairs, the official actions of its directors and officers, the investment and disposition of its funds, the security offered to members and whether or not it was violating any provisions of law within the meaning of § 7-1-8 U.C.A.

C. Notify the board of directors of any banking business in writing if any officer or employee of that bank was found to be dishonest, reckless or incompetent or failed to perform any duty of his office within the meaning of § 7-1-13 U.C.A.

D. Require the board of directors of each banking business to examine the affairs of the institution with a special purpose of ascertaining the value and security thereof within the meaning of § 7-1-14 U.C.A.

E. Call for not less than four reports each year concerning the condition of each banking business and to certify such report for publication within the meaning of § 7-1-17 U.C.A.

F. Call for special reports as may be necessary for the protection of the public within the meaning of § 7-1-18 U.C.A.

G. Inform the county attorney of any violation of any provision of law which constitutes a misdemeanor or felony by any officer, director or employee of any banking business within the meaning of § 7-1-23 U.C.A.

H. Refuse to grant approval for the filing of articles of incorporation of any banking business when the plan of operation does not comply with the laws of this state within the meaning of § 7-1-26 U.C.A.

I. Take possesion of the business and property of any banking business which is conducting its business in an unauthorized or unsafe manner within the meaning of § 7-2-1 U.C.A.

5. Defendants have wholly failed to discharge the duties and responsibilities pleaded in ¶ 4 above.

6. Plaintiffs reasonably believed that defendants had discharged the duties and responsibilities pleaded in ¶ 4 above.

7. Plaintiffs relied upon defendants to inspect and supervise Grove Finance Company as pleaded in ¶ 4 above; and in reliance thereon, plaintiffs have each deposited or placed substantial sums of money with Grove Finance Company.

8. Grove Finance Company has wholly failed to meet the requirements set up by Utah law, viz., § 7-3-1 et seq. U.C.A. As a result thereof, Grove Finance Company has become insolvent.

9. By reason of the insolvency of Grove Finance Company, the named plaintiffs have lost substantial sums of money, the exact amount of which cannot be ascertained prior to discovery.

CLASS ACTION ALLEGATIONS

10. This action is brought by plaintiffs as a class action on their own behalf and on behalf of all others similarly situated under the provisions of Rule 23 of the Utah Rules of Civil Procedure.

11. The class consists of all persons, or other entities, who have deposited funds with Grove Finance Company, a Utah corporation, with its principal place of business in Utah County.

12. The exact number of class members is not known, but plaintiffs allege on information and belief that there are in excess of one thousand members. The class is so numerous that joinder of individual members herein is impracticable.

13. There are common questions of law and fact among class members; namely, whether the State of Utah properly supervised and inspected Grove Finance Company.

14. The claims of plaintiffs who are representatives of the class herein are typical of the claims of the class in that the claims of the named plaintiffs and the claims of the class members each arise by reason of a banking relationship with Grove Finance Company. There is no conflict as between any individually-named plaintiffs and other members of the class with respect to this action or with respect to the claims for relief herein set forth.

15. The named plaintiffs will fairly and adequately protect the interests of the class.

16. This action is properly maintained as a class action for the following reasons:

A. The prosecution of separate actions by individual members of the class would create a risk of varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the defendant herein which opposes the class.

B. The prosecution of separate actions by individual members of the class would create a risk of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications, or would substantially impair or impede their ability to protect their interests.

C. The questions of law and fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

WHEREFORE, plaintiffs demand that defendants reimburse each class member for the monies plus interest received by Grove Finance Company for each such class member. The exact amount of such recovery to be determined after completion of class certification and discovery.

DATED this 2nd day of March, 1981.

ROBERT J. DEBRY
Attorney for Plaintiffs

APPENDIX B

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

RICHARD D. MADSEN and NANCY MADSEN, his wife, BOYD A. SWENSEN and BEATRICE SWENSEN, his wife, BLAINE ANDERSON and SHEREE ANDERSON, his wife, HOPE A. HILTON, CYNTHIA HILTON, RALPH M. HILTON, GENE HELLAND and the MIDDLE EAST FOUNDATION, Plaintiffs, vs. MIRVIN D. BORTHICK, W. SMOOT BRIMHALL, and JOHN DOES I to V, being former Commissioners of the Utah Department of Financial Institutions, Defendants.	COMPLAINT (Class Action)

COME NOW the plaintiffs for themselves and all others similarly situated and allege as follows:

1. Plaintiffs were each depositors in Grove Finance Company.

2. John Does I through V are persons whose identities are not presently known. However, they are former Commissioners of the Utah Department of Financial Institutions. This allegation includes each commissioner who has held office from

the incorporation of Grove Finance to the insolvency of Grove Finance. As these identities are determined by discovery, plaintiffs will amend this complaint and insert the true identities.

3. Grove Finance Company was a Utah corporation transacting a banking business within the State of Utah within the meaning of §7-3-1, U.C.A. in that Grove Finance Company held itself out to the public as receiving money on deposit within the meaning of §7-3-3 U.C.A.

PLAINTIFFS' CAUSE OF ACTION

4. John Does I through V and the Defendant Mirvin D. Borthick and W. Smoot Brimhall had a duty to inspect and supervise the financial integrity of Grove Finance Company within the meaning of §7-1-7 U.C.A. In particular, defendants had a duty to do the following:

A. Visit and examine every banking business at least once each year within the meaning of §7-1-8 U.C.A.

B. At the time of each annual visit to inquire into the condition and resources of the institution examined, the mode of conducting and managing its affairs, the official actions of its directors and officers, the investment and disposition of its funds, the security offered to members and whether or not it was violating any provisions of law within the meaning of §7-1-8 U.C.A.

C. Notify the Board of Directors of any banking business in writing if any officer or employee of that bank was found to be dishonest, reckless or incompetent or railed to perform any duty of his office within the meaning of §7-1-13, U.C.A.

D. Require the Board of Directors of each banking business to examine the affairs of the institution with a special purpose of ascertaining the value and security thereof within the meaning of §7-1-14, U.C.A.

E. Call for not less than four reports each year concerning the condition of each banking business and to certify such report for publication within the meaning of §7-1-17 U.C.A.

F. Call for special reports as may be necessary for the protection of the public within the meaning of §7-1-18, U.C.A.

G. Inform the county attorney of any violation of any provision of law which constitutes a misdemeanor or felony by any officer, director or employee of any banking business within the meaning of §7-1-23 U.C.A.

H. Refuse to grant approval for the filing of articles of incorporation of any banking business when the plan of operation does not comply with the laws of this state within the meaning of §7-1-26 U.C.A.

I. Take possession of the business and property of any banking business which is conducting its business in an unauthorized or unsafe manner within the meaning of §7-2-1 U.C.A.

5. Defendants have been grossly negligent in that they have wholly failed to discharge any of the duties and responsibilities pleaded in ¶4 above.

6. Plaintiffs reasonably believed that Defendants had discharged the duties and responsibilities pleaded in ¶4 above.

7. Plaintiffs relied upon defendants to inspect and supervise Grove Finance Company as pleaded in ¶4 above; and in reliance thereon, plaintiffs have each deposited or placed substantial sums of money with Grove Finance Company.

8. Grove Finance Company has wholly failed to meet the requirements set up by Utah Law, viz., §7-3-1 et seq. U.C.A. As a result thereof, Grove Finance Company has become insolvent.

9. Plaintiffs did not discover the defendants' gross negligence until on or about July 18, 1980, when Grove Finance was forced to close its doors. Plaintiffs could not reasonably have learned of the defendants' gross negligence at any earlier time because the plaintiffs did not have access to any of the defendants' reports or work product. Furthermore, the defendants lulled the plaintiffs by giving periodic reports that no problems existed with Grove Finance.

10. By reason of the insolvency of Grove Finance Company, the named Plaintiffs have lost their deposits in Grove Finance

except that the bankruptcy court has or will pay a small dividend on the loss.

PLAINTIFFS' ALTERNATIVE CAUSE OF ACTION

11. If Grove Finance is not transacting a "banking business" within the meaning of §7-3-1, Utah Code Ann., then it is a "regulated lender" within the meaning of §70B-3-501 Utah Code Ann.

12. Defendants had a duty to investigate the financial responsibility of Grove Finance prior to issuing a license. (§70B-3-503 (2) U.C.A.) Defendants failed to make any such investigation.

13. Defendants had a duty to examine periodically at intervals the loans, business, and records of Grove Finance. Defendants failed to make any such examination (§70B-3-506(1) Utah Code Ann.)

14. Defendants had a duty to revoke the license of Grove Finance. (§70B-3-504, Utah Code Ann.) Defendants did not make any timely revocation.

15. Plaintiffs relied upon the defendants to make timely investigations, examinations, and revocations. If Defendants had made any investigation, examination, or timely revocation as alleged above, the Plaintiffs would not have deposited their funds in Grove Finance; or, in the alternative, plaintiffs would have withdrawn their funds from Grove Finance.

16. Grove Finance has become insolvent because of improper conduct that would have been uncovered by any timely investigation or examination.

17. By reason of the insolvency of Grove Finance, the Plaintiffs have lost their deposits, except that a small dividend has been or will be paid on deposits by the bankruptcy court.

18. Defendants have been grossly negligent in that they have wholly failed to discharge any of the duties and responsibilities pleaded above.

19. Plaintiffs did not discover the defendants' gross negligence until on or about July 18, 1980, when Grove Finance was forced to close its doors. Plaintiffs could not reasonably have learned of the defendants' gross negligence at any earlier time because the plaintiffs did not have access to any of the defendants' reports or work product. Furthermore, the defendants lulled the plaintiffs by giving periodic reports that no problems existed with Grove Finance.

WHEREFORE, Plaintiffs demand judgment against defendants as follows:

1. For the amount of deposits made to Grove Finance, plus accrued interest, and minus any dividends from the bankruptcy court. The exact amount is not presently known. However, plaintiffs will seek leave of court to amend the

complaint when discovery is completed.

2. For such other and further relief as the court deems just and proper.

DATED this 16 day of July, 1983.

ROBERT J. DEBRY & ASSOCIATES

APPENDIX C

STATUTES CITED

U.C.A. 63-30-4 (prior to 1983):

> Nothing contained in this act, unless specifically provided, is to be construed as an admission or denial of liability or responsibility in so far as governmental entities ar concerned. Wherein immunity from suit is waived by this act, consent to be sued is granted and liability of the entity shall be determined as if the entity were a private person.
>
> The remedy against a governmental entity or its employee for an injury caused by an act or omission which occurs during the performance of such employee's duties, within the scope of employment, or under color of authority is, after the effective date of this act, exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or the estate of the employee whose act or omission gave rise to the claim, unless the employee acted or failed to act through gross negligence, fraud, or malice.
>
> An employee may be joined in an action against a governmental entity in a representative capacity if the act or omission complained of is one for which the governmental entity may be liable, but no employee shall be held personally liable for acts or omissions occurring during the performance of the employee's duties, within the scope of employment or under color of authority, unless it is established that the employee acted or failed to act due to gross negligence, fraud or malice.

U.C.A. 63-30-4 (as amended by 1983 Legislature):

> (1) Nothing contained in this chapter, unless specifically provided, shall be construed as an admission or denial of liability or responsibility in so far as governmental entities or their employees are concerned. If immunity from suit is waived by this chapter, consent to be sued is granted and liability of the entity shall be determined as if the entity were a private person.
>
> (2) Nothing in this chapter shall be construed as adversely affecting any immunity from suit which a governmental entity or employee may otherwise assert under state or federal law.
>
> (3) The remedy against a governmental entity or its employee for an injury caused by any act or omission which occurs during the performance of such employee's duties, within the scope of employment, or under color of authorty is, after the effective date of this act, exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or the estate of the employee whose act or omission gave rise to the claim, unless the employee acted or failed to act through fraud or malice.
>
> (4) An employee may be joined in an action against a governmental entity in a representative capacity if the act or omission complained of is one for which the governmental entity may be liable, but no employee may be held personally liable for acts or omissions occurring during the performance of the employee's duties, within the scope of employment or under color of authority, unless it is established that the employee acted or failed to act due to fraud or malice.

U.C.A. 63-30-10 (prior to 1982 amendment):

> Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of his employment except if the injury:
>
> (1) arises out of the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused, or
>
> (2) arises out of assault, battery, false imprisonment, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, or civil rights, or
>
> (3) arises out of the issuance, denial, suspension, or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order, or similar authorization, or
>
> (4) arises out of a failure to make an inspection, or by reason of making an inadequate or negligent inspection of any property, or
>
> (5) arises out of the institution or prosecution of any judicial or administrative proceeding, even if malicious or without probable cause, or
>
> (6) arises out of a misrepresentation by said employee whether or not such is negligent or intentional, or
>
> (7) arises out of or results from riots, unlawful assemblies, public demonstrations, mob violence and civil disturbance, or
>
> (8) arises out of or in connection with the collection of and assessment of taxes, or
>
> (9) arises out of the activities of the Utah National Guard, or
>
> (10) arises out of the incarceration of any person in any state prison, county or city jail or other place of legal confinment, or
>
> (11) arises from any natural condition on state lands or the result of any activity authorized by the state land board.

U.C.A. 64-30-11 (prior to 1983):

> Any person having a claim for injury to person or property against a governmental entity or its employee shall, before maintaining an action under this act, file a written notice of claim with such entity for appropriate relief including money damages. The notice of claim shall set forth a brief statement of the facts and the nature of the claim asserted, shall be signed by the person making the claim or such persons's agent, attorney, parent or legal guardian, and shall be directed and delivered to the responsible governmental entity within the time prescribed in section 63-30-12 or 63-30-13, as applicable.
>
> Service of the notice of claim upon an employee of a governmental entity is not a condition precedent to the commencement of an action or special proceeding against such person. If an action or special proceeding is commenced against the employee, but not against the governmental entity, service of the notice of claim upon the governmental entity is required only if the entity has a statutory duty to indemnify such person.
>
> If the claimant is under the age of majority, or mentally incompetent and without a legal guardian, or imprisoned at the time the cause of action accrued, the court, in its discretion, may extend the time for service of notice of claim, but in no event shall it grant an extension which exceeds the general statutory period of limitation applicable to the cause of action. In determining whether to grant an extension, the court shall consider whether the delay in serving the notice of claim will substantially prejudice the governmental entity in maintaining its defense on the merits.

U.C.A. 63-30-11 (as amended by 1983 Legislature):

> (1) A claim is deemed to arise when the statute of limitations that would apply if the claim were against a private person commences to run.
>
> (2) Any person having a claim for injury against a governmental entity or against an employee for an act or omission occurring during the performance of his duties, within the scope of employment, or under color of authority shall, before maintaining an action, file a written notice of claim with such entity.
>
> (3) The notice of claim shall set forth a brief statement of the facts, the nature of the claim asserted, and the damages incurred by the claimant so far as they are known, shall be signed by the person making the claim or such person's agent, attorney, parent or legal guardian, and shall be directed and delivered to the responsible governmental entity in the manner and within the time prescribed in section 63-30-12 or 63-30-13, as applicable.
>
> (4) If, at the time the claim arises, the claimant is under the age of majority, or mentally incompetent and without a legal guardian, or imprisoned, upon application by the claimant and after hearing and notice to the governmental entity the court, in its discretion, may extend the time for service of notice of claim, but in no event shall it grant an extension which exceeds the applicable statute of limitations. In determining whether to grant an extension, the court shall consider whether the delay in serving the notice of claim will substantially prejudice the governmental entity in maintaining its defense on the merits.

U.C.A. 63-30-12 (prior to 1983):

> A claim against the state is barred unless notice of claim is filed with the attorney general and the agency concerned within one year after the cause of action arises.

U.C.A. 63-30-12 (as amended by 1983 Legisalture):

> A claim against the state or its employee for an act or omission occurring during the performance of his duties, within the scope of employment, or under color of authority, is barred unless notice of claim is filed with the attorney general and the agency concerned within one year after the claim arises, or before the expiration of any extension of time granted under subsection 63-30-11(4).

U.C.A. 63-30-15 (prior to 1983):

> If the claim is denied, a claimant may institute an action in the district court against the governmental entity in those circumstances where immunity from suit has been waived as in this act provided. Said action must be commenced within one year after denial or the denial period as specified herein.

U.C.A. 63-30-15 (as amended by 1983 Legislature):

> If the claim is denied, a claimant may institute an action in the district court against the governmental entity in those circumstances in which immunity from suit has been waived in this chapter. The action must be commenced within one year after denial or the denial period as specified in this chapter.

U.C.A. 63-30-36 (enacted by 1983 Legislature):

> (1) Before a governmental entity may defend its employee against a claim, the employee must make a written request to the governmental entity to defend him and must make it within ten days after service of process upon him or within such longer period as would not prejudice the governmental entity in maintaining a defense on his behalf, or conflict with notice requirements imposed on the entity in connection with insurance carried by the entity relating to the risk involved. If the employee fais to make a request or fails to reasonably cooperate in the defense, the governmental entity is not required to defend or continue to defend the employee, nor pay any judgment, compromise, or settlement against the employee in respect to the claim.
>
> (2) If a governmental entity conducts the defense of an employee, the governmental entity shall pay any judgment based upon or any compromise or settlement of the claim except as provided in subsection (3).
>
> (3) A governmental entity may conduct the defense of an employee under an agreement with the employee that the government entity reserves the right not to pay the judgment, compromise, or settlement unless it is established that the claim rose out of an act or omission occurring during the performance of his duties, within the scope of his employment, or under color of authority.

U.C.A. 63-48-1 (repealed by 1983 Legislature):

> The purpose of this act is to protect officers and employees of public entities from personal liability arising from acts or omissions committed during the performance of their duties, within the scope of their employment, or under color of authority.

U.C.A. 63-48-2(3) (repealed by 1983 Legislature):

> As used in this act:
>
> . . .
>
> (3) "Claim" means any alleged personal legal liability arising out of any act or omission by any officer or employee during the performance of his duties, within the scope of his employment, or under color of authority.

U.C.A. 63-48-3 (repealed by 1983 Legislature):

> (1) If any officer ro employee desires the public entity to defend him against any claim, the officer or employee shall request the public entity in writing to do defend him not later than ten days after service of process upon him in respect to the claim. If the officer or employee fails to make such request of the public entity, or if the officer or employee fails to reasonably co-operate in the defense of the claim, then the public entity is not obligated to defend the officer or employee against the claim or continue this defense in case of such failure to co-operate, nor pay any judgment, compromise, or settlement in respect to the claim.
>
> (2) If the public entity conducts the defense of the officer or employee against the claim, then the public entity shall pay any judgment based upon or any compromise or settlement of the claim except as provided in subsections (3) or (4) of this section.
>
> (3) In connection with the defense of the officer or employee against a claim, the public entity may conduct the defense under an agreement with that officer or employee to the effect that the public entity reserves the right not to pay the judgment, compromise, or settlement until it is established that the claim arose out of an act or omission occurring during the performance of his duties, within the scope of his employment, or under color

of authority.

(4) No public entity is obligated to pay any judgment based upon a claim against an officer or employee if it is established that the officer or employee acted or failed to act due to gross negligence, fraud, or malice.

(5) Nothing in this section authorizes a public entity to pay such part of a claim or judgment as is for punitive or exemplary damages.

U.C.A. 63-48-4 (repealed by 1983 Legislature):

(1) Subject to subsection (2) of this section, if an officer or employee pays any judgment entered against him, or any portion of it, which the public entity is required to pay under section 63-48-3, the officer or employee is entitled to recover the amount of such payment and the costs of his defense from the public entity.

(2) If the public entity does not conduct the defense of an officer or employee against a claim or does conduct this defense under an agreement as provided in subsection 3 of section 63-48-3, the officer or employee may recover from the public entity under subsection (1) of this section only if:

(a) He establishes that the act or omission upon which the judgment is based occurred during the performance of his duties, within the scope of his employment, or under color of authority and that he conducted the defense of the claim against him in good faith; and

(b) The public entity fails to establish that the officer or employee acted or failed to act due to gross negligence, fraud, or malice.

U.C.A. 78-12-26(4):

> Within three years:
>
> . . .
>
> (4) An action for a liability created by the statutes of this state, other than for a penalty or forfeiture under the laws of this state, except where in speical cases a different limitation is prescribed by the statutes of this state.

U.C.A. 78-12-40:

> If any action is commenced within due time and a judgment thereon for the plaintiff is reversed, or if the plaintiff fails in such action or upon a cause of action otherwise than upon the merits, and the time limited, either by law or contract for commencing the same shall have expired, the plaintiff, or if he dies and the cause of action survives, his representatives, may commence a new action within one year after the reversal or failure.